

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

CHRISTOPHER BEAUFORD,

USDS 07-02067	DOCUMENT
<b>ELECTRONICALLY FILED</b>	
<b>DOC #:</b> _____	
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Plaintiff,

04 Civ. 7533 (JGK)

- against -

MEMORANDUM OPINION  
AND ORDER

JOHN DOE #1, JOHN DOE #2, JOHN DOE #3,  
LIEUTENANT O'DELL, BARBARA TEARS  
(NURSE), and SERGEANT NAZI,

Defendants.

JOHN G. KOELTL, District Judge:

The defendants have moved to dismiss this action pursuant to Federal Rule of Civil Procedure 41(b) for lack of prosecution. The Court examines five principal factors to decide such a motion: (1) the duration of the plaintiff's failures, (2) whether the plaintiff received notice that further delays would result in dismissal, (3) whether the defendants are likely to be prejudiced by further delay, (4) a balancing of the need to alleviate court congestion against the plaintiff's right to due process and a fair chance to be heard, and (5) whether lesser sanctions would be adequate. See Shannon v. Gen. Elec. Co., 186 F.3d 186, 193-94 (2d Cir. 1999); Handlin v. Garvey, 91 Civ. 6777, 1996 WL 673823, at \*3 (S.D.N.Y. Nov. 20, 1996).

The plaintiff filed his pro se complaint in September of 2004, and filed an Amended Complaint on November 1, 2004 while he was incarcerated at the Groveland Correctional Facility in

Sonyea, New York. The Amended Complaint seeks compensation for excessive force, humiliation, and failure to treat the plaintiff's injuries resulting from an alleged incident at Dutchess County Jail in Poughkeepsie, New York. Defendant Barbara Tears answered the Amended Complaint on February 24, 2005, and the remaining defendants answered on February 28, 2005. In a letter dated March 14, 2005, the plaintiff informed the defendants' counsel of his release from prison and his new address in Schenectady, New York. Since that time, the defendants have received no correspondence from the plaintiff.

On January 13, 2006, defendant Tears's counsel mailed a set of discovery requests to the plaintiff, but the plaintiff did not respond for over nine months, well in excess of the thirty days allowed under the Federal Rules of Civil Procedure. On November 3, 2006, defendant Tears' counsel again sent correspondence to the plaintiff requesting responses to the discovery demands, but the letter was returned by the United States Postal Service marked undeliverable. Correspondence from the Clerk of the Court has also been returned as undeliverable. It is apparent that the plaintiff has not kept the Court and the defendants apprised of his current address.

After the defendants filed their motions to dismiss and there was no timely response, the Court issued an Order dated December 22, 2006 extending the time to respond to the motions

and warning the plaintiff that if he did not respond, the Amended Complaint would be dismissed for failure to prosecute, in which event he would have no trial. The plaintiff has failed to respond after this extension.

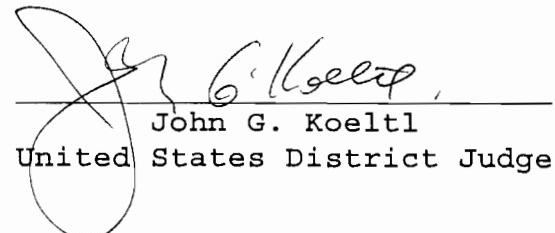
The plaintiff has now been unresponsive to an outstanding discovery request for more than a year. A Court order explicitly warned the plaintiff that further inaction would result in dismissal prompted to response. Any failure of the plaintiff to receive actual notice of this Order, which was served by mail to his last known address, was of the plaintiff's own doing, as he is responsible for updating his current address. See Lukensow v. Harley Cars, 124 F.R.D. 64, 66 (S.D.N.Y. 1989). The Court can presume that the defendants have been prejudiced and will continue to be by further delay where as here the plaintiff has already been unresponsive for a long period of time. Id. at 67. The plaintiff has had more than ample opportunity to have his case heard. The first four factors stated above therefore favor dismissal.

This case cannot proceed without the plaintiff's prosecution of it and his availability and willingness to respond to discovery requests. A dismissal without prejudice is a lesser sanction than dismissal with prejudice and is the only reasonable lesser sanction that is sufficient under the circumstances.

The Amended Complaint is **dismissed without prejudice** as against all defendants for failure to prosecute. The Clerk of the Court is directed to enter judgment and to close this case.

SO ORDERED.

Dated:      New York, New York  
February 12, 2007

  
John G. Koeltl  
United States District Judge